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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TYRONE SPIKES, Defendant and Appellant.	B203625 (Los Angeles County Super. Ct. No. GA066067)

APPEAL from a judgment of the Superior Court of Los Angeles County. Janice C. Croft, Judge. Affirmed in part, reversed in part, and remanded with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson, and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tyrone Spikes appeals from his conviction of second degree robbery of Grace Hou, attempted second degree robbery of Mandy Yuen, assault with a deadly weapon upon Susan Hernandez, possession of a firearm by a felon, illegal possession of ammunition, unlawful taking or driving of a vehicle, and leaving the scene of an accident. The jury also found true two personal use of firearm enhancements.[1]

He contends: (1) substantial evidence did not support the personal use allegation in the Hou robbery; (2) the trial court erred, and defendant received ineffective assistance of counsel, in the manner the jury was instructed on "personal use;" (3) substantial evidence did not support the assault with a deadly weapon charge; (4) he was denied due process by the trial court's failure to instruct on the elements of assault; and (5) section 654 bars multiple punishment for several of the convictions and enhancements.[2] We reverse due to instructional error on the assault charge and also to modify defendant's sentence. In all other respects, we affirm.

FACTUAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that in May 2006, defendant was in the Cathay Bank in Alhambra when a security guard told bank employee Mandy Yuen that defendant was wanted by the police. When Yuen saw defendant at the bank on June 17, 2006, she became suspicious and went to another room to call 911. While Yuen was speaking to the 911 operator, she overheard defendant say, "Where's the money?" About five minutes later, defendant entered the room. He was holding a gun in his left hand, partially covered by a handkerchief.

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[1] Defendant stipulated that he had committed a prior felony for purposes of the felon in possession and illegal possession of ammunition counts. Defendant was sentenced to a total of 21 years in prison; we discuss the details of that sentence below.

All undesignated statutory references are to the Penal Code.

[2] Defendant also contends, and the People agree, that the abstract of judgment must be corrected to reflect that the one-year prior conviction enhancement was imposed pursuant to section 667.5.

Defendant did not point the gun at Yuen. When defendant asked Yuen where the money was, Yuen said she did not know.

Bank teller Grace Hou testified that she was with a client at her teller's station when she heard a loud noise; turning, Hou saw defendant jumping over the counter through the teller window. Hou immediately locked her cash drawer, took the keys and hid under a nearby table. From there, Hou activated a silent alarm. From her hiding place, Hou heard defendant say, "Where the -- where's the money? Where's the money? Where's the money?" After defendant left the bank, Hou discovered that her purse and more than $10,000 of the bank's money were missing from a drawer at her station.

The robbery was captured on the bank's surveillance camera. Sergeant Edward Godfrey of the Los Angeles Sheriff's Department viewed the tape and had still pictures printed from it. Three still photographs of the robbery were introduced into evidence. Godfrey testified that one of the photographs depicted defendant in the bank holding a revolver in his right hand and a trash can in his left hand. A second showed defendant "traversing the bank counter holding a revolver" in his right hand and a plastic bag in his left hand. The third showed defendant "appearing to begin his descent over the counter and although it's blurry, he's holding an object that appears to be a weapon in his right hand."

The day of the robbery, Alhambra Police Officer Jose Vaca responded to a report of a robbery in progress at the Cathay Bank. After learning that the suspect had fled in a silver pickup truck, Vaca pursued a silver pickup truck he saw wending its way through traffic. Vaca was within 12 feet of the driver's side door when he made eye contact with defendant and yelled at him to give up. Defendant accelerated and twice rammed the truck into the car in front of it. When the light changed, defendant again began weaving through traffic. Vaca fired at the truck and hit the door three or four times.

Two other police officers who participated in the pursuit were in patrol cars equipped with dashboard cameras. The tapes of the pursuit were introduced into evidence. The car chase ended on the westbound 101 Freeway when defendant's truck stopped suddenly and a police car rear ended it. Defendant climbed out of the driver's side window of the truck and ran away, but was caught moments later.

Susan Hernandez was a passenger in one of the cars defendant hit during the high speed chase. Hernandez was badly bruised and sustained a whiplash injury. The car in which she was riding was totaled.

The pickup truck defendant was driving was impounded. The truck's original license plates had been replaced with paper plates like those used by car dealers. Inside the truck was an organizer containing defendant's identification and credit cards; a trash can containing $10,620 in currency; a box that said "$250 in dimes;" a folder containing business cards; Hou's purse; and a .32-caliber revolver.

The pickup truck defendant was driving that day was owned by Jim Shepherd. Shepherd testified that on May 23, 2006 (three weeks before the bank incident), he had parked the truck and left the keys in the ignition while he went into a building for a few minutes. When Shepherd came out of the building, he saw his truck being driven away. Shepherd filed a police report. The truck had two ordinary license plates.

DISCUSSION

A. *Errors Relating to Personal Use of a Firearm in the Hou Robbery*

Defendant contends there was insufficient evidence to support the personal gun-use enhancement in the Hou robbery because, he argues, Hou never saw defendant use a gun. We assume for this argument there is insufficient evidence that Hou saw defendant with a gun. This omission is not legally significant.

Section 12022.53, subdivision (b) provides a 10-year enhancement for "any person who, in the commission of a [robbery], personally uses a firearm . . . ." The phrase " 'uses a firearm,' . . . encompasses the display of an unloaded or inoperable firearm. [Citation.] Under this understanding of the term 'uses,' a defendant uses a firearm by intentionally displaying it in a menacing manner, firing it, or striking or hitting a human being with it. [Citation.]" (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42.) Whether a gun is "used" is "broadly construed within the factual context of each case." (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1001.)

Although there may be some room for debate on the subject, appellate courts have held that a gun that is displayed does not need to be seen by the victim to be "used" for enhancement purposes. As the court observed in *People v. Granado* (1996) 49 Cal.App.4th 317, 326-327 (*Granado*), risks associated with gun use are often increased if the victim sees the gun; nevertheless, they still exist even if the weapon is not seen by the victim. A gun is more likely to go off when held menacingly in a hand than when resting in a holster or waistband. (*Id.* at p. 327.) We agree. Defendant acknowledges there was substantial evidence of gun use if the law does not require the victim to observe the weapon. The surveillance video and still photographs introduced into evidence showed defendant holding a gun as he climbed over the counter into the teller's area. That Hou did not testify that she saw defendant displaying a gun in a menacing manner does not detract from defendant's use.[3]

We also reject two other defense arguments that are founded on the victim not seeing the gun. First, he asserts denial of due process when the trial court allowed the parties to reargue the gun-use point after the jury asked whether the victim's observation was necessary. During the brief argument, both counsel told the jury that the victim did not have to see the gun. This was, as we have just held, a correct statement of the law, one with which defendant's trial counsel agreed. Accordingly, there was no error. Also unavailing is defendant's claim that his attorney rendered ineffective assistance of counsel by conceding the point before the jury. Under the circumstances of this case, that statement by defense counsel did not prejudice the defendant and therefore did not constitute ineffective assistance by counsel.

B. *Substantial Evidence Supports the Conviction for Assault With A Deadly Weapon Upon Hernandez*

Defendant contends he was denied due process because there was insufficient evidence to support his conviction of assault with a deadly weapon. This charge was factually predicated on

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[3] In support of his argument, defendant cites *People v. James* (1989) 208 Cal.App.3d 1155. To the extent *James* holds that in the present context a gun is not used unless it is observed by the victim, we respectfully disagree, as did the court in *Granado*. (*Granado, supra,* 49 Cal.App.4th at p. 326.)

defendant intentionally ramming the pickup truck into Hernandez's car during the police pursuit. Defendant argues that while he may have driven recklessly during the pursuit, the evidence did not establish that he acted "in a manner that would necessarily result in contact with another." We disagree.

When a conviction rests in part in circumstantial evidence, as is often the case in proof of criminal intent, the appellate court reviews the evidence with the same substantial evidence measure as in other cases. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054.) We affirm if there is reasonable and credible evidence of solid value, such that a reasonable trier of fact could find guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1.) The mental state required for assault with a deadly weapon "is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*People v. Rocha* (1971) 3 Cal.3d 893, 899.) The prosecution need not prove a specific intent to inflict a particular harm. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) The requisite intent can be proved by evidence of an act inherently dangerous to others done with conscious disregard of human life and safety. (*Id*. at pp. 220-221.) In *People v. Williams* (2001) 26 Cal.4th 779, 784, our Supreme Court held that "assault requires actual knowledge of those facts sufficient to establish that the offending act by its nature would probably and directly result in physical force being applied to another." An automobile may be a deadly weapon within the meaning of the statute. (*People v. Russell* (2005) 129 Cal.App.4th 776, 782.)

Here, Hernandez testified that at 12:30 p.m. on June 17th, she was in the passenger seat and her husband was driving their white Chrysler 300 west on the 101 Freeway when defendant's pickup truck rear-ended their car. Hernandez described what happened next as follows: "Then as the truck kept trying to go past us and hit the front part of the car, it made a motion that pushed me to the right side of the car into the door."

Police Officer Mejia joined the pursuit of defendant on the westbound 10 Freeway. A copy of the tape from his police car's dashboard camera was introduced into evidence and played for the jury as Mejia narrated. Mejia described defendant transitioning from the westbound 10 Freeway to the northbound 101 Freeway, where traffic was much heavier. Defendant hits two cars after making a "violent left turn."

Narrating the video from her dashboard camera for the jury, Police Officer Esther Rodriguez described defendant cutting "off a vehicle instead of getting off the freeway. Still failing to yield. He just hit one car there and is now going to start ramming other cars."

A reasonable inference from the evidence was that defendant did not accidentally hit Hernandez's car during the pursuit but intentionally rammed into it in order to clear a path to drive the pickup truck through traffic. Using a pickup truck to push another car out of the way is an act that by its nature would probably and directly result in physical force being applied to the occupants of the car. This conduct was sufficient to support a conviction of assault with a deadly weapon.

Defendant's reliance on *People v. Cotton* (1980) 113 Cal.App.3d 294, for a different result is misplaced. In that case, there was no evidence that the defendant intended to collide with the victim's vehicle during a high speed police chase. Rather, the evidence showed that the defendant tried unsuccessfully to avoid the accident. (*Id*. at p. 302.)

C. *The Trial Court's Failure to Instruct on the Elements of Assault Was Error*

Defendant contends, and the People agree, that defendant's conviction of assault with a deadly weapon must be reversed because the trial court had a sua sponte duty to give CALJIC No. 9.00, defining assault, but failed to do so. We agree. (*People v. Sheldon* (1989) 48 Cal.3d 935, 961-962 [reversing assault with a deadly weapon conviction where trial court failed to define assault].) Accordingly, we set aside the conviction for assault with a deadly weapon (count 4) and remand for a new trial on that charge. (See *People v. Tillotson* (2007) 157 Cal.App.4th 517, 548 [reversed and remanded for new trial because of instructional error].)

D. *Substantial Evidence Supports the Conviction of Unlawful Taking of a Vehicle*

Defendant contends there was insufficient evidence to support the conviction of violating Vehicle Code section 10851, subdivision (a). The statute prohibits driving or taking a vehicle "without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . ." (Veh. Code, § 10851, subd. (a)(1).) He argues that

there was no evidence that he was involved in the actual taking of Shepherd's pickup truck, or that defendant even knew that it was stolen.

A similar contention was rejected by the court in *People v. Malamut* (1971) 16 Cal.App.3d 237, 241 (*Malamut*), which held that "[p]ossession of recently stolen property is so incriminating that only slight additional evidence is necessary to sustain a conviction. [Citation.] Evidence of a false explanation as to how the property came into the defendant's possession will suffice to sustain a conviction for its theft. [Citation.]" In *Malamut*, the defendant was found driving a car two months after it was stolen. The appellate court found evidence that the license plates and motor had been changed, the serial number altered, forged title documents were found in defendant's possession and defendant gave a false explanation for how he came into possession of the vehicle was sufficient to support the conviction. (*Ibid*.; see also *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577.)

Here, defendant was found driving Shepherd's car three weeks after it was stolen. As in *Malamut*, the license plates had been changed. Defendant offered no evidence of how he came into possession of the car. This evidence was sufficient to support the conviction.

E. *Section 654 Sentencing Issues*

Defendant contends section 654 barred double punishment for, respectively: (a) robbery, leaving the scene of an accident, and unlawful driving, or taking a vehicle; (b) possession of a firearm and possession of the ammunition in that firearm; and (c) possession of a firearm and an enhancement for use of that firearm.[4] We agree as to the second argument only.

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[4] Defendant was sentenced to 21 years in prison comprised of: Count 1 (robbery): 13 years, 3 years plus a consecutive 10 years for the gun use (§ 12022.53, subd. (b)); count 2 (attempted robbery): a consecutive 4 years, 8 months (one-third the midterm) plus a consecutive 40 months (one-third of 10 years) for the gun use; count 4 (assault with a deadly weapon): a consecutive 1 year (one-third the 3-year midterm); count 7 (unlawful driving): a consecutive 1 year (one-third the 3-year midterm); count 8 (possession of a firearm): a concurrent 2 years; count 9 (possession of ammunition): a concurrent 2 years; count 10 (leaving the scene of an accident): a consecutive 2 years (one-third the midterm doubled pursuant to the "Three Strikes" law).

1. General Principles

"Penal Code section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.]" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525 (*Perry*).)

It is well settled that section 654 limitations do not apply to crimes of violence against multiple victims. (*People v. Oates* (2004) 32 Cal.4th 1048, 1062-1063.) Moreover, if a defendant "had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence." (*Perry, supra*, 154 Cal.App.4th at p. 1525.)

An example of these principles is *People v. Trotter* (1992) 7 Cal.App.4th 363. There, defendant commandeered a taxi at gunpoint. During the ensuing freeway chase, he fired three shots at a police car. The court held that the defendant could be separately punished for three separate assaults, reasoning that "this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. '[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.' [Citation.]" (*Id.* at p. 368.)

2. Robbery, Leaving the Scene, and Unlawful Driving

We reject defendant's contention that section 654 bars multiple punishments for (1) robbery, (2) unlawful driving, and (3) leaving the scene of an accident because these offenses represent a "single, indivisible, course of conduct that spanned the robbery and the flight from the police."

In *In re Hayes* (1969) 70 Cal.2d 604, 611 (*Hayes*), our Supreme Court held that section 654 does not bar multiple punishments for driving with an invalid license and while intoxicated. In *People v. Beamon* (1973) 8 Cal.3d 625, the court explained that this was because neither offense "although simultaneously committed, was a means toward the objective of the commission of the other. The objectives, insofar as the criminal conduct was concerned, were deemed by the [*Hayes*] majority to be to drive while intoxicated and to drive with a suspended license." (*Id*. at p. 639.)

In *People v. Butler* (1986) 184 Cal.App.3d 469, the defendant was convicted of, among other things, vehicular manslaughter and leaving the scene of an accident. Relying on *Hayes*, the appellate court rejected the defendant's contention that section 654 barred multiple punishments. It reasoned that the crimes evidenced two separate states of mind: "[the defendant] negligently drove a motor vehicle while under the influence of alcohol and caused a fatal accident. Defendant then violated Vehicle Code section 20001 by intentionally leaving the scene of the accident instead of remaining and rendering aid as required by law. This was an independent and separate criminal act." (*Id*. at p. 474.) If multiple punishments were prohibited in such a case, "there would be no incentive for a person who causes an accident to stop and render aid as required by Vehicle Code section 20001." (*Ibid.*)

Here, as to all three of the offenses, there were separate victims and defendant's state of mind in committing each crime was different. He intended to steal (or attempt to steal) money and property at the bank; he unlawfully drove the truck belonging to someone else, and he intended to flee an accident, which in itself involves no predicate criminal act.

3. Possession of a Firearm and Possession of Ammunition

We agree with defendant that section 654 bars multiple punishments for possession of a firearm (§ 12021, subd. (a)(1)) and possession of ammunition in that same firearm (§ 12316, subd. (b)(1)). *People v. Lopez* (2004) 119 Cal.App.4th 132, 137-138 is directly on point. The People ask us to disagree with our colleagues in Division 6 but offer no persuasive reason for doing so.

4. Possession of a Firearm and Enhancements for Use of That Firearm

Without merit is defendant's contention that section 654 precludes multiple punishments for possession of a firearm (§ 12021, subd. (a)(1)) and the gun-use enhancement imposed on the robbery and attempted robbery convictions (§ 12022.53, subd. (b)). He argues that there is no evidence that defendant possessed the handgun he used in the robbery and attempted robberies prior to the robbery and attempted robbery. We disagree.

In *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143, the court held that punishment for both crimes is proper "where the evidence shows a possession distinctly antecedent and separate from the primary offense." It is improper where the evidence " 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .' [Citation.]" (*Ibid.*)

Here, there is no evidence that by fortune defendant obtained the gun simultaneously with the robbery, e.g., by taking it out of the hands of a security guard (see *People v. Bradford* (1976) 17 Cal.3d 8 [section 654 bars multiple punishment where defendant shoots officer with gun defendant wrested away from the officer moments before]). On the contrary, from the photograph showing defendant holding a gun before he climbed over the teller window, it is reasonable to infer that defendant arrived at the bank with the gun in his possession. Under these circumstances, multiple punishments were proper.

DISPOSITION

The conviction on count 4 (assault with a deadly weapon) is reversed and the matter remanded for a new trial on that count. The trial court is ordered to modify appellant's sentence to stay the two-year term imposed on count 8 (possession of ammunition) and to correct the abstract of judgment to reflect that the prior conviction enhancement was imposed pursuant to

section 667.5 (see fn. 2, *ante*). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

BAUER, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.